

## MEMORANDUM OF LAW

DATE: August 17, 1992

TO: Councilmember John Hartley

FROM: City Attorney

SUBJECT: Pamo Valley

We have received your memoranda of June 9, and July 20, 1992 regarding Pamo Valley. You have posed several questions to the City Manager and our office concerning the use of Pamo Valley for the construction and use of the proposed Pamo Dam and Reservoir. Before we respond to the legal issues you raise, some historical background may be useful.

### BACKGROUND

The Pamo Valley was first identified as a suitable site for a dam and reservoir in 1928 when it was acquired by The City of San Diego. As the demand for water in the City and County increased, review of the Pamo Valley as a means of mitigating their emergency water storage problems was renewed. In 1978, the City and the San Diego County Water Authority ("CWA") began negotiations for the transfer of the City property to the CWA and the construction of an emergency water storage reservoir in Pamo Valley. The CWA was to act as the lead agency in the construction of the project.

On December 13, 1982, the City passed Resolution No. R-257653 to authorize an agreement with the CWA relating to the design, financing, construction, and use of the proposed Pamo Dam and Reservoir. The authorization set forth in the resolution, however, purported to be only an approval in principle for the construction of the project; it further allowed for the CWA to proceed with the development of financial arrangements and the preparation of plans and specifications. Pursuant to the Agreement, the City retained the right to review the financial arrangements, plans, specifications, and contract documents. Finally, the agreement and the resolution provided that the City had either the option to approve the construction of the project or terminate the Agreement and reimburse the CWA for one-half of its costs incurred as of that date.

On January 13, 1983, the Board of Directors of the CWA authorized the execution of the Agreement with the City for the construction and operation of the Pamo Dam and Reservoir. The CWA then proceeded to conduct an Environmental Impact Study ("EIS") of the proposed project.

After completion of the EIS in 1987, the CWA applied to the U.S. Army Corps of Engineers for a permit to proceed with construction of the Pamo Dam and Reservoir. On November 25, 1987, however, the Environmental Protection Agency ("EPA") notified the Corps of Engineers that it opposed the issuance of the permit and declared it intended to halt the project. Some of the reasons cited for its opposition included the environmental damage posed by the construction; a weak, underfunded mitigation plan; and the failure of the CWA to consider alternatives to the Pamo Valley site.

In light of the EPA's opposition, in December 1987 the City hired the firm of Leedshill-Herkenhoff, Inc., to review and evaluate the Pamo project. Shortly thereafter, the CWA Board of Directors suspended its request to the Army Corps of Engineers for issuance of a permit to proceed. In 1989, CWA reevaluated the project and proceeded to conduct a study of other optional sites for water storage in the county.

The Leedshill-Herkenhoff review of the Pamo project was concluded and a report was issued to Council in January 1989. In summary, the report affirmed the EPA's conclusions that there are less environmentally-damaging practicable alternatives for emergency water storage than the proposed Pamo project.

#### QUESTIONS

You asked our office to address the following questions:

- 1) What actions can the City Council take to protect Pamo Valley from use as a water storage facility?
- 2) Does the City Council have any jurisdiction over the use of water from the new Domenigioni Reservoir in Riverside County?
- 3) What is the status of the 1982/83 Agreement between the City and the CWA regarding Pamo Valley?
- 4) Have there been any modifications to this Agreement?

#### ANALYSIS

##### 1. ACTIONS TO PROTECT PAMO VALLEY

Section 5 of the Agreement with the CWA provides the City with the right to review the proposed financial arrangements, plans, specifications and contract documents prepared by the CWA for the Pamo project when they are concluded. Upon concluding its review, the City may, at its sole discretion, either approve

or disapprove the arrangements and plans. This provision was reiterated in Council Resolution No. R-257653. According to Section 5(a) of the Agreement, in the event the City disapproves the arrangements and plans, the Agreement is terminated.

Should the City decide to exercise its option to disapprove the project, Section 5(a) provides that the City shall reimburse the CWA for one-half of its costs incurred as of that date. One could argue, however, that inasmuch as the Council explicitly expressed its intention that its authorization of the Agreement constituted only an approval in principle (See, City Council Resolution No. R-257653, adopted on December 13, 1982, and attached hereto), it never agreed to be bound by the terms and conditions of the Agreement. Hence, it could be contended that Section 5(a) is not legally enforceable against the City, and that the CWA would not be able to recover one-half of its costs from the City.

Assuming the Agreement is legally enforceable, the City may have other remedies. Pursuant to the Recitals of the Agreement, the CWA is obligated to use its best efforts to design, finance, construct, use and operate the Pamo project in accordance with the Agreement. Section 4 of the Agreement provides that following completion of the environmental process (pursuant to Section 2 of the Agreement), the CWA shall make arrangements to finance and construct the Pamo project. Arguably, the CWA completed its environmental process in 1987 when the EIS was concluded and forwarded to the Corps of Engineers. By failing to take any action to finance or construct the project since the conclusion of this process, one could conclude that the CWA has failed to use its best efforts to construct the project subsequent to completion of the environmental process, and therefore has breached the Agreement.

Finally, Section 5(b) of the Agreement provides that if construction of a dam in the Pamo Valley is not commenced by CWA within seven (7) years from the date the Agreement was executed, then title to the property reverts to the City. Section 10 of the Agreement states the Agreement may be terminated for just cause as established under applicable law. Given the failure of the CWA to use its best efforts to commence construction of the project following completion of the environmental study and its failure to use its best efforts to commence construction within seven (7) years, the City may assert the CWA has breached the Agreement. Consequently, the City may claim it has just cause for terminating the Agreement.

## **2. DOMENIGIONI RESERVOIR**

The Domenigioni Reservoir is a project of the Metropolitan

Water District of Southern California ("MWD") to be located in Riverside county. Inasmuch as the City Council's jurisdiction is restricted to matters within the limits and boundaries of the City of San Diego, the Council does not have any jurisdiction over the use of water from the Domenigioni Reservoir. (See, San Diego City Charter section 3.) Moreover, even if the City had extraterritorial jurisdiction, it still would not have any direct authority with regard to the policy decisions of the MWD. This is because the MWD is a special agency created by the state legislature, and the MWD legislation does not provide for the City's membership in its board of directors. Rather, the City's ability to influence the decisions of the MWD is derived from, and limited to, the CWA's influence as a member of the MWD.

### 3. STATUS OF AGREEMENT

See discussion regarding question 1 above.

### 4. MODIFICATIONS TO AGREEMENT

As of this date, the parties have not made any modifications to the Agreement in writing. Section 9 of the Agreement, however, does provide for the ability of the parties to modify the Agreement by mutual assent. Section 9 states, "the perpetual nature of the agreement prompts concern about whether changed circumstances may, in the future, indicate that the purposes and goals of the agreement are not being met or that fairness is not being achieved." In light of the construction of the Domenigioni Reservoir and other issues which were highlighted in the Leedshill-Herkenhoff study, the City could claim that changed circumstances demand modifications to the Agreement. The proposed modifications could entail measures to ensure that any decision to construct a dam and reservoir in the Pamo Valley is the best alternative available.

### CONCLUSION

It could be contended that the City's authorization of the Agreement with the CWA for the Pamo project constituted only an approval in principle. Thus, arguably, the City is not bound by the Agreement with the CWA. Assuming the Agreement is legally enforceable, the City may claim the CWA has failed to use its best efforts to complete the project, both with respect to Section 2 (Environmental Process) and Section 5(b) (Reversion Rights). By failing to use its best efforts, the CWA has breached the Agreement; the City therefore may claim it has just cause for terminating the Agreement.

Finally, the City has no jurisdiction over the use of water from the Domenigioni Reservoir. It does, however, have the ability to modify the current Agreement with the CWA based upon changed circumstances resulting from the availability of water

from the Domenigioni Reservoir and the results of the  
Leedshill-Herkenhoff study.

The remainder of the questions posed by your memoranda  
appear to be within areas of responsibility of the City Manager.  
We understand he will respond to you by separate correspondence  
on those issues.

We hope this information will be helpful to you. Should  
you have any questions, however, please do not hesitate to  
contact our office.

JOHN W. WITT, City Attorney

By

Kelly J. Salt

Deputy City Attorney

KJS:mrh:jrl:411(x043.2)

Attachment

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